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The Upper Deck Company

15  
16 UNITED STATES DISTRICT COURT  
17 DISTRICT OF NEVADA

18 ANIPLEX, INCORPORATED, a Japanese  
corporation,  
19 Plaintiff and Counter-Defendant,  
20 vs.  
21 THE UPPER DECK COMPANY, a Nevada  
corporation,  
22 Defendant and  
23 Counterclaimant.

) Case No. 2:08-CV-00442-HDM-PAL

)  
) **DECLARATION OF JOHN SEPENUK**  
) **IN SUPPORT OF DEFENDANT AND**  
) **COUNTERCLAIMANT THE UPPER**  
) **DECK COMPANY'S OPPOSITION TO**  
) **ANIPLEX, INC.'S MOTION FOR**  
) **PARTIAL SUMMARY JUDGMENT**

) [Oral Argument Requested]

) [Memorandum of Points and Authorities in  
) Opposition; Statement of Genuine Issues;  
) Evidentiary Objections; Notice of Manual  
) Filing of Evidence; and Declarations of  
) Kristina Fredericks and Jordan Mendoza  
) Filed Concurrently Herewith]

1 I, John Sepenuk, declare as follows:

2 1. I am a former employee of The Upper Deck Company ("Upper Deck"). I make this  
3 declaration in support of Upper Deck's Opposition to Aniplex, Incorporated's ("Aniplex") Motion  
4 for Partial Summary Judgment. Unless otherwise stated, I have personal knowledge of the matters  
5 stated herein and, if called upon, I could and would competently testify hereto. As to those matters  
6 about which I do not have personal knowledge, my statements are made upon information and  
7 belief.

8 2. I worked on and off as an employee or consultant for Upper Deck from 1997  
9 through November 2008. I was initially a marketing manager for the Asia Pacific territories. From  
10 April 2003 until November 2008, I was employed at Upper Deck as Managing Director of Asia  
11 Pacific. Generally, my responsibilities as Managing Director of Asia Pacific included managing  
12 Upper Deck's relationship with Konami regarding the Yu-Gi-Oh! trading card game and  
13 overseeing the Asia Pacific territory for sales and distribution of Upper Deck's core products which  
14 were trading cards and some collectibles. In or about 2005, I was promoted to Vice President of  
15 International and my responsibilities increased to cover sales and distribution of Upper Deck's core  
16 products in Latin America. In 2007, my title changed to Vice President of Global Business  
17 Development. This was a shift in responsibility away from the bottom line sales-driven  
18 responsibilities and more towards global business development activities, which focused on  
19 original intellectual property development. Part of my responsibilities as Managing Director of  
20 Asia Pacific and Vice President of International included the responsibility for negotiating  
21 agreements with third parties such as Aniplex relating to "Kiba." I was the person at Upper Deck  
22 responsible for the management of the "Kiba" project.

23 3. During production of the "Kiba" anime series, I voiced my concerns to Asa Suehira  
24 at Aniplex regarding the repeated use of sword fighting rather than shard battles in "Kiba" and the  
25 inappropriate level of violence depicted in the anime. Attached hereto as Exhibit 41 is a true and  
26 correct copy of an email I sent on April 5, 2005 to Mr. Suehira stating that Upper Deck was  
27 frustrated by the emphasis on sword fighting and the inappropriate violence in the "Kiba" anime.  
28 Included with Exhibit 41 is Mr. Suehira's response sent on the same date.

1           4.       The "Kiba" anime began airing in early April 2006. On April 11, 2006,  
2 immediately upon reviewing the first few episodes of "Kiba," I sent a lengthy email to Mr. Suehira  
3 detailing Upper Deck's serious concerns with the first four episodes of the "Kiba" anime. Attached  
4 hereto as Exhibit 42 is a true and correct copy of the April 11, 2006 email from myself to Mr.  
5 Suehira.

6           5.       Throughout the summer of 2006, I and others at Upper Deck remained concerned  
7 about the quality and content of the "Kiba" anime. This led to a payment dispute between Aniplex  
8 and Upper Deck under the Short Form.

9           6.       Individuals from Upper Deck and Aniplex met in Las Vegas, Nevada in September  
10 2006, to discuss their respective concerns. I attended that meeting along with Richard McWilliam  
11 of Upper Deck and Kenichi Oshima of Upper Deck Japan. At that meeting we discussed the  
12 possibility of amending the parties' Short Form agreement with respect to the manner and timing of  
13 the payments. I always intended that there would be a written agreement memorializing any  
14 amendment of the Short Form and that any such agreement would not be binding until it was  
15 signed by both parties. It was my understanding that this was Upper Deck's position as well.

16           7.       On or about October 4, 2006, Mr. Suehira sent me an email attaching a proposed  
17 amendment to the Short Form, which included new payment terms. Attached hereto as Exhibit 43  
18 is a true and correct copy of that email. Later the parties discussed incorporating the proposed  
19 amendment into an amended and restated short form agreement.

20           8.       Aniplex had been demanding payment under the Short Form for several months. On  
21 or about November 7, 2006, I asked Richard McWilliam, the CEO of Upper Deck, to authorize  
22 payment of \$205,226.70 to Aniplex as a good faith accommodation to Aniplex in anticipation of  
23 eventually reaching agreement on the terms of an amended and restated short form agreement. At  
24 the time, I did not believe that we had reached any binding agreement as to the terms of an  
25 amended and restated short form agreement.

26           9.       On or about November 8, 2006, I asked Richard McWilliam to authorize payment of  
27 \$1,131,341.40 to Aniplex as a good faith accommodation to Aniplex in anticipation of eventually  
28 reaching agreement on the terms of an amended and restated short form agreement. At the time, I

1 did not believe that we had reached any binding agreement as to the terms of an amended and  
2 restated short form agreement.

3 10. On or about December 21, 2006, I received an email from Kenichi Oshima  
4 informing me that Jun Tanaka from Aniplex would not sign the amended and restated short form  
5 agreement until Upper Deck provided Aniplex with its signature on the document. Attached hereto  
6 as Exhibit 44 is a true and correct copy of that email.

7 11. I did not give Mr. Oshima authority to send the email attached to the declaration of  
8 Mr. Pollack as Exhibit 41, or to accept any amended and restated short form on behalf of Upper  
9 Deck..

10 12. On or about December 26, 2006, I received an email from Mr. Suehira informing  
11 me that Aniplex was ready to sign the amended and restated short form agreement and asking me  
12 to have Mr. McWilliam sign the agreement. Later that same day, I received another email from  
13 Mr. Suehira informing me that that he had "found some comments that need to be made on the  
14 agreements" and asking me not to have Mr. McWilliam sign the agreement. Attached hereto as  
15 Exhibit 45 is a true and correct copy of those emails.

16 13. On or about January 10, 2007, Mr. Tanaka from Aniplex forwarded a revised draft  
17 of the amended and restated short form agreement to Mr. Oshima that further revised the payment  
18 terms of the draft agreement. That same day, Mr. Oshima forwarded that draft agreement to me.  
19 Attached hereto as Exhibit 46 is a true and correct copy of the revised draft redline of the amended  
20 and restated short form agreement prepared by Aniplex.

21 14. On or about January 10, 2007, Mr. Tanaka sent me an email asking for the reason  
22 for Upper Deck's delay in payment. I informed him that the delay in payment was caused by the  
23 delay in finalizing the amended and restated short form agreement and reminded him that Upper  
24 Deck had been asked by Aniplex not to sign the agreements. Attached hereto as Exhibit 47 is a  
25 true and correct copy of the emails between myself and Mr. Tanaka dated January 10 and 11, 2007.

26 15. Upper Deck did not accept the terms of the revised amended and restated short form  
27 agreement that had been circulated by Aniplex on or about January 10, 2007. On or about January  
28 19, 2007, I sent an email to Mr. Tanaka informing him that Upper Deck had discovered an issue

1 relating to the earlier payment of \$3 million to Aniplex's sister company, Dream Ranch, which had  
2 been addressed in the Short Form and draft amended and restated short form. Upper Deck needed  
3 to resolve that issue as part of the parties' continuing negotiations over the amended and restated  
4 short form. Attached hereto as Exhibit 48 is a true and correct copy of my January 19, 2007 email  
5 to Mr. Tanaka.

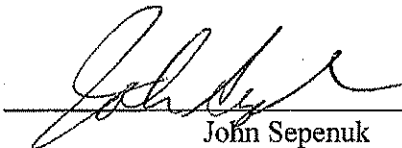
6 16. On or about February 14, 2007, Adam Sullins who was, at the time, in-house  
7 counsel for Upper Deck, sent a letter to Mr. Tanaka setting forth Upper Deck's proposal for  
8 addressing Upper Deck's and Aniplex's disputes and addressing the issue relating to the earlier  
9 payment of \$3 million to Dream Ranch. Attached hereto as Exhibit 49 is a true and correct copy of  
10 that letter.

11 17. On or about March 7, 2007, Gregory Payne, an attorney for Aniplex, sent a letter to  
12 Mr. Sullins setting forth a revised proposal for addressing Upper Deck and Aniplex's disputes.  
13 Attached hereto as Exhibit 50 is a true and correct copy of that letter.

14 18. Aniplex and Upper Deck were eventually unable to reach a resolution of their  
15 disputes. On or about August 8, 2007, Mr. Payne sent a letter to Upper Deck declaring Upper Deck  
16 in breach of the original Short Form. Attached hereto as Exhibit 51 is a true and correct copy of  
17 Mr. Payne's letter to Upper Deck. Upper Deck responded to that letter on August 9, 2007.  
18 Attached hereto as Exhibit 52 is a true and correct copy of the August 9, 2007 letter from an  
19 attorney in Upper Deck's legal department, Kyle Campbell, to Mr. Payne.

20  
21 I declare under penalty of perjury that the foregoing is true and correct.

22  
23 Executed on this 18 day of August, 2010, at Irving, California.

24  
25   
26 John Sepenuk  
27  
28